Norimah bte Mohamed & Ors v Bukit Lenang Development Sdn Bhd and other appeals

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO J–02–178 OF 1999, J–02–68 OF 1999 AND J–02–205 OF 1999
GOPAL SRI RAM, HAIDAR JJCA AND AZMEL J
4 APRIL 2000

Civil Procedure *— Summary possession of land — Application for — Arguable issues raised — Respondent took title with express knowledge of presence of appellants on the land — Whether appellants had acquired interests in land — Whether summary applicable — Rules of the High Court 1980 O 89*

At all material times, Oakfield Enterprise Sdn Bhd ('Oakfield') was the registered proprietor of a piece of land held under 407 separate documents of title. The appellants occupied that land and Oakfield took the view that they were squatters. In 1994, negotiations took place between Oakfield and the appellants. A sum of RM3,000 was collected from each of the appellants. Despite having obtained an order for possession in its favour, Oakfield did not pursue its claim for vacant possession against the appellants. The appellants were encouraged to believe that they would receive an interest in the lands in question from Oakfield in return for the payments made by them.

On 15 March 1996, the respondents entered into a sale and purchase agreement with Oakfield under which it bought the lands. The respondent took the land without vacant possession and with full knowledge of the presence of the appellants upon it. After obtaining registration of title in its favour, the respondent instituted proceedings for summary recovery of possession under O 89 of the Rules of the High Court 1980 ('the RHC'). The learned judge held that it was an appropriate case to be dealt under O 89 and that the respondent was entitled to an order for possession (see [1999] 6 MLJ 25). It was against that order that these appeals have been brought. The issue was whether summary procedure under O 89 was available to the respondent. Counsel for the appellants argued that this was not an appropriate case to be dealt with under O 89 as the case was riddled with triable issues, inter alia: (i) whether the appellants had acquired an interest in the lands; and (ii) whether there was a concluded agreement for the transfer of interest in the lands between Oakfield and the appellants.

Held, allowing the appeal:

(1) Summary procedure under O 89 is inapplicable to a case in which arguable issues have been raised (see p 133F); *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343 followed. The issues identified by the appellants constitute serious triable issues that are wholly inappropriate for resolution under the summary jurisdiction which O 89 confers (see p 133E).

(2) The appellants, whatever their legal position may have been before 1994, appear ex-facie to have entered into a transaction

with the respondent's predecessor in title. Since the respondent took title with express knowledge, it may be possible for the appellants to argue that the respondent is equally bound by any contract that may have been entered between the appellants and Oakfield (see pp 134H–135A).

[Bahasa Malaysia summary

Pada semua masa matan, Oakfield Enterprise Sdn Bhd ('Oakfield') adalah tuan punya berdaftar sebidang tanah yang dipegang di bawah 407 dokumen hak milik yang berbeza. Perayu-perayu telah menduduki tanah tersebut dan Oakfield berpendapat bahawa mereka adalah setinggan-setinggan. Pada tahun 1994, rundingan-rundingan telah berlaku antara Oakfield dan perayu-perayu. Suatu jumlah sebanyak RM3,000 telah dikutip daripada setiap perayu-perayu. Walaupun telah mendapat perintah yang berpihak kepadanya, Oakfield tidak meneruskan tindakannya untuk milikan kosong terhadap perayu-perayu. Perayu-perayu telah digalakkan untuk mempercayai bahawa mereka akan menerima suatu kepentingan di dalam tanah yang dikatakan daripada Oakfield sebagai balasan pembayaran yang dibuat oleh mereka.

Pada 15 Mac 1996, responden-responden telah memasuki suatu perjanjian jual beli dengan Oakfield di mana ia membeli tanah-tanah tersebut. Responden telah mengambil tanah tersebut tanpa milikan kosong dan dengan pengetahuan penuh kehadiran perayu-perayu di atasnya. Selepas memperolehi pendaftaran hak milik tersebut di pihaknya, responden telah memulakan prosiding-prosiding untuk mendapat kembali milikan secara terus di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Hakim yang arif telah memutuskan bahawa ia adalah kes yang sesuai untuk diputuskan di bawah A 89 dan bahawa responden berhak untuk mendapatkan perintah milikan (lihat [1999] 6 MLJ 25). Ia adalah terhadap perintah tersebut bahawa rayuan-rayuan ini telah dibawa. Isu adalah sama ada prosedur terus di bawah A 89 adalah terbuka kepada responden. Peguam untuk perayu-perayu menghujahkan bahawa ia bukanlah kes yang sesuai untuk diputuskan di bawah A 89 kerana kes tersebut mempunyai isu-isu yang perlu dibicarakan, antara lain: (i) sama ada perayu-perayu telah memperolehi kepentingan di atas tanah-tanah; dan (ii) sama ada terdapat perjanjian yang disimpulkan untuk pindahan kepentingan di atas tanah-tanah antara Oakfield dan perayu-perayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Prosedur terus di bawah A 89 tidak terpakai kepada kes di mana isu-isu yang boleh dibicarakan telah dibangkitkan (lihat ms 133F); *Bohari bin Taib & Ors v Pengarrah Tanah Galian Selangor* [1991] 1 MLJ 343 diikut. Isu-isu yang dikenal pasti oleh perayu-perayu terjumlah kepada isu-isu serius yang boleh

dibicarakan yang adalah kurang sesuai untuk ditentukan di bawah bidang kuasa penghakiman di mana A 89 memberikan kuasa (lihat ms 133E).

(2) Perayu-perayu tidak kira apa kedudukan undang-undang mereka sebelum 1994, secara ex-facie telah memasuki suatu transaksi dengan tuan punya hak milik sebelum responden. Oleh kerana responden telah mengambil hak milik dengan pengetahuan nyata, mungkin terdapat kemungkinan untuk perayu-perayu untuk berhujah bahawa responden juga adalah tertakluk kepada sebarang kontrak yang mungkin telah dimasuki antara perayu-perayu dan Oakfield (lihat ms 134H–135A).]

Notes

For cases on summary possession of land, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4781–4794.

Cases referred to

Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor [1991] 1 MLJ 343 (folld)

Bukit Lenang Development Sdn Bhd v Penduduk-Penduduk yang Menduduki atas Tanah HS (D) 151079 – HS (d) 151601, Mukim Plentong, Daerah Johor Bahru [1999] 6 MLJ 25 (refd)

Krishnadas & Ors v Maniyam [1997] 1 MLJ 94 (refd)

Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224 (refd)

Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor [1999] 4 MLJ 233 (refd)

Legislation referred to

Rules of the High Court 1980 O 89

Specific Relief Act 1950 s 26(b)

Karpal Singh (*Karpal Singh & Co*) for the appellants in Civil Appeal No J–02–178 of 1999.

Karpal Singh (*Karpal Singh & Co*) for the 43 appellants and *Abdul Razak Ahmad* (*Lim Gek Hui* with him) (*Abdul Haris Norhayati & Co*) for the 160 appellants in Civil Appeal No J–02–68 of 1999.

Abdul Razak Ahmad (*Lim Gek Hui* with him) (*Abdul Razak Ahmad & Associates*) for the appellants in Civil Appeal No J–02–205 of 1999.

Izzat Othman (*Rose Zilawati bte Mohd Arifin* with him) (*Chua Brothers, Azzat & Izzat*) for the respondents in Civil Appeal No J–02–178 of 1999, J–02–68 of 1999 and J–02–205 of 1999.

Gopal Sri Ram JCA (delivering oral judgment of the court): The narrow issue in these appeals is whether the summary procedure under O 89 of the Rules of the High Court 1980 ('the RHC') is available to the respondent before us. The facts relevant to the resolution of this issue are as follows.

At all material times, a company known as Oakfield Enterprise Sdn Bhd ('Oakfield') was the registered proprietor of a piece of land held under 407 separate documents of title. The appellants occupied that land. Oakfield took the view that they were squatters. In late 1989, it commenced proceedings for summary recovery for possession under RHC O 89. On 8 November 1989, it obtained an order in its favour. Attempts to execute that order proved unsuccessful. So, Oakfield took out committal proceedings. This was heard by LC Vohrah J, who on 16 December 1991 made an order in favour of Oakfield.

There was an appeal against that order. The Supreme Court on 6 December 1993 allowed the appeal and discharged the orders made by LC Vohrah J. Later, in 1994, negotiations took place between Oakfield and the appellants. A firm of advocates and solicitors, M/s J Singh & Co, represented Oakfield. It is common ground that Mr J Singh was also a director of Oakfield. A sum of RM3,000 was collected from each of the appellants as evidenced by the receipts produced in the records made available to us. Despite having obtained an order for possession in its favour, Oakfield did not, therefore, pursue it's claim for vacant possession against the appellants. It would appear from the allegations made by the appellants in their affidavits that they were encouraged to believe that they would receive an interest in the lands in question from Oakfield in return for the payments made by them.

By 1995, Oakfield was in financial straits. A winding-up petition had been presented against it. It obviously wanted to rescue itself from the financial disaster it faced. It decided to sell the land held under the 407 titles.

On 15 March 1996, the respondents entered into a sale and purchase agreement with Oakfield under which it bought the land in question. The sale was as stated in said agreement as being on an as is where is basis. The respondent took the land without vacant possession and with full knowledge of the presence of the appellants upon it. After obtaining registration of title in its favour, the respondent instituted proceedings for summary recovery of possession under RHC O 89.

Its application was heard by Zainun Ali J, in the High Court at Johor Bharu. The learned judge held that the appellants were squatters, that this was an appropriate case to be dealt under O 89 and that the respondent was entitled to an order for possession. She accordingly held in the respondent's favour (see [1999] 6 MLJ 25). It is against that order that these appeals have been bought.

We must pause here to mention that there are in fact three appeals before us. Each appeal is by a different set of the occupiers of the land in question.

Encik Karpal Singh who represents 95 of the appellants has argued that this is not an appropriate case to be dealt with under O 89. He submits that the case is riddled with triable issues. Among these, counsel has identified the question whether the appellants had acquired an interest in the aforesaid lands and whether that interest binds the instant respondents. Encik Karpal

Singh's argument is that the respondent having taken the land with knowledge of the appellants presence cannot be in a better position than Oakfield. The other question which counsel has identified as constituting a triable issue is whether there is a concluded agreement for the transfer of interest in the aforesaid lands between Oakfield and the appellants.

Encik Abdul Razak Ahmad who appeared for the remaining appellants adopted the arguments of En Karpal Singh. He additionally relied on the possible breach of a fiduciary obligation by Oakfield's solicitor in getting the appellant to execute certain documents in the course of the negotiations between Oakfield and the appellants. It is En Abdul Razak's argument that the weight to be attached to the documents is a matter that must be gone into at a full trial in proceedings commenced by writ and through the employment of *viva voce* evidence. Counsel therefore argued that this was not a case that falls within the summary procedure jurisdiction conferred upon the court by O 89.

Encik Izzat Othman in responding to the appeals has argued that whatever may be the position between the appellants and Oakfield, the instant respondent is immunised by reason of having acquired an indefeasible title. He has argued that *vis-à-vis* his client, the appellants are trespassers with no rights of occupation. He submits that the learned judge was correct in her finding both upon issue of possession and jurisdiction.

After carefully considering the arguments addressed to us by counsel, we are satisfied that there is much force in the submissions advanced on behalf of the appellants. In our judgment, the issues identified by En Karpal Singh and En Abdul Razak constitute serious triable issues that are wholly inappropriate for resolution under the summary jurisdiction which O 89 confers.

The position in the instant appeals is adequately covered by high authority. We refer to the decision of the Supreme Court in *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343, where it was held the summary procedure under O 89 is inapplicable to a case in which arguable issues have been raised. It is sufficient for us to cite Mohd Azmi SCJ in that case at p 346:

> In our view, the appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and some, not all, of the farmers have occupied the land for three years under licence and thereafter have remained in occupation with the continued consent of the state government by virtue of the 1980 alienation already approved prior to the TOLs. The learned State Legal Adviser, En Hishamuddin for the respondent, pointed out that the TOLs and therefore consent were given only up to 1983. After that no TOL was issued, thus indicating absence of consent. In our view, the alleged continued consent of the state government to their occupation notwithstanding the expiry of the TOLs, is one of the serious issues to be tried. The case for the appellants is that they were already in occupation with consent prior to 1981 and the grant of TOLs from 1981 to 1983 is merely part of the chain of events supporting the existence of an approval of alienation of the lands to them by the state authority under s 42 of the National Land Code 1965, and pending issue of titles under s 77(2) they

are entitled to remain on the land not as squatters but as of right. The approval of the state authority as exhibited by the appellants, would appear to have been made on 4 September 1980, according to the letter of the Collector of Sabak Bernam dated 25 October. The opening paragraph of the letter at p 95 of the appeal records reads:

> 'Merujuk kepada perkara tersebut di atas, dimaklumkan bahawa permohonan tuan/puan ke atas tanah di rancangan tersebut di atas telah diluluskan oleh Majlis Mesyuarat Kerajaan Negeri pada 4 September 1980.'

We are therefore of the opinion that there are issues to be tried in this case which are not suitable to be decided by affidavit evidence, We accordingly agree that this case should not be dealt with summarily under O 89.

Mohamed Azmi SCJ then went on to state at para B–D:

> In our opinion, for the purpose of summary procedure, *a distinction should be made between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over.* It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different. On the facts, we hold that there are triable issues on the absence of either licence or consent as alleged by the respondent. Evidence viva voce is required not only on the alleged consent of the respondent to the appellants' occupation rendering their entry unlawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s 42 of the National Land Code 1965. (Emphasis added.)

In *Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor* [1999] 4 MLJ 233, the Federal Court affirmed the approach that commended itself to the Supreme Court in *Bohari*'s case. Zakaria Yatim FCJ who delivered the judgment of the court on that occasion said at p 245:

> Similarly in the present case, if the initial entry of the settlers on the said land was unlawful, they had committed an offence under s 425(1) of the National Land Code. They could also be evicted under O 89 for being squatters simpliciter. From the evidence the state government knew of their presence on the said land from December 1981. No action was taken to charge them under the National Land Code for illegally occupying the said land. No proceeding was taken to evict them under O 89. From January 1988 the Menteri Besar knew about the settlers. He approved the renovation of their surau. He knew that the settlers were provided with water supply, roads and a community hall. As stated earlier, *when the land was given to PKNS, it knew about the settlers.* In our opinion there is an arguable case that the settlers occupied the said land with acquiescence of the state authority. (Emphasis added.)

In our judgment, the present appeal is a far stronger case than the fact patterns that were before the court either in *Bohari* or *Shaheen*. In the present instance, the appellants, whatever their legal position may have been before 1994, appear *ex-facie* to have entered into a transaction with the respondent's predecessor in title. Since the respondent took title with express knowledge, it is may be possible for the appellants to argue that the respondent is equally bound by any contract that may have been entered

between the appellants and Oakfield. In this context, s 26(b) of the Specific Relief Act 1950 is relevant. It provides as follows:

> Except as otherwise provided under this Chapter, specific performance of a contract may be enforced against —
>
> (b) any other person claiming under a party to the contract by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

The effect of this section with regard to registered proprietorship of land was considered in *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224. See also, *Krishnadas & Ors v Maniyam* [1997] 1 MLJ 94.

Since the respondent's right to immediate vacant possession is under a cloud for the reasons advanced by En Karpal Singh, we are satisfied that the facts in the instant case make it entirely unsuitable to be dealt summarily under O 89.

For the reasons already given, we hold that there are arguable issues and that accordingly this appeal must succeed. The appeal is allowed and the orders usually consequent upon success will be now be made.

Appeal allowed.

Reported by Benjamin Yong